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In The

Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, et al.,

Petitioners,

v.

DEFENDERS OF WILDLIFE, et al.,

Respondents.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

DEFENDERS OF WILDLIFE, et al.,

Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE STATE OF ALASKA IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICUS CURIAE

The State of Alaska files this amicus brief in support of the petitions for writ of certiorari filed by the United States Environmental Protection Agency (EPA) and the National Association of Home-Builders *et al.*[1] Alaska is keenly interested in this case because it has recently applied to the EPA to assume responsibility for administration of the National Pollutant Discharge Elimination System (NPDES) permit program under the Clean Water Act (CWA).[2] The CWA provides that "the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to [EPA] a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact."[3] EPA and the Alaska Department of Environmental Conservation (Alaska) are currently discussing the legal adequacy of Alaska's program application.

The decision of the Court of Appeals for the Ninth Circuit[4] has created uncertainty and concern for Alaska in its on-going efforts to secure EPA's approval of its NPDES permitting program. Alaska agrees with the petitioners that the Ninth Circuit decision merits review by this Court, and urges the Supreme Court to grant the petitions for a writ of certiorari.

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[1] Sup. Ct. R. 37.

[2] *See* 33 U.S.C. § 1342(b).

[3] *Id.*

[4] *Defenders of Wildlife v. EPA*, 420 F.3d 946 (9th Cir. 2005).

ARGUMENT

Alaska urges the Court to review the Ninth Circuit decision because it imposes on the EPA a duty unintended by Congress, to determine whether transfer of NPDES permitting authority to state officials would jeopardize species listed under the Endangered Species Act (ESA). The practical consequence of the decision is to impose the duty of ESA consultation onto state officials, at least in those few states that don't already have an EPA-approved permit program. The decision also conflicts with decisions from other circuits that have considered the same issue.[5]

Alaska is one of only five states that have not yet received EPA approval to assume responsibility for administering the NPDES permit program.[6] Over the past two years, Alaska has been actively developing all required components of its program submission, in close coordination with EPA's Region 10 staff. In assembling its NPDES program, Alaska has been guided by the federal statutory[7] and regulatory[8] criteria for approval of a state program. After two years of preparation, Alaska filed its formal application with EPA on July 5, 2006.

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[5] *American Forest & Paper Ass'n v. EPA*, 137 F.3d 291 (5th Cir. 1998) and *Platte River Whooping Crane Habitat Maint. Trust v. FERC*, 962 F.2d 27 (D.C. Cir. 1992); *See* Sup. Ct. R. 10(a).

[6] *See Defenders of Wildlife v. EPA*, 420 F.3d at 950. The other four states without an approved program are Idaho, Massachusetts, New Hampshire and New Mexico.

[7] *See* CWA § 402(b), 33 U.S.C. § 1342(b).

[8] *See* 40 C.F.R. Part 123.

The Ninth Circuit decision in this case threatens to disrupt Alaska's efforts by introducing difficult and unexpected questions about whether and how EPA must comply with the ESA in considering whether to approve Alaska's program. The decision effectively adds to the CWA's listed criteria for a state permit program approval the requirement that the EPA include a consultation under ESA section 7(a)(2), to evaluate the impacts on listed species of a state program approval.[9] The Ninth Circuit imposed this additional requirement despite the CWA's plain directive that the EPA "shall approve" state applications that satisfy the specific criteria set forth in 33 U.S.C. § 1342(b).[10]

In addition to contradicting the plain language of the CWA, the decision presents practical difficulties both for the EPA and for a state such as Alaska, that hopes to administer the program. In considering a state's NPDES program application, the EPA cannot meaningfully evaluate potential effects on endangered species caused by federal approval of a state's NPDES program. Presumably any such effects would not arise from EPA's program approval itself, but rather from specific discharges that the state might authorize in the future. Yet, when EPA first approves a state NPDES program, it has no way of knowing precisely for what kinds of future projects and activities applicants may seek discharge permits from the

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[9] Section 7(a)(2) of the ESA requires that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2).

[10] *See* 42 U.S.C. § 1342(b)(1)-(9).

state. To intelligently evaluate potential effects of state-issued permits on listed species, the EPA would need to know what activities might someday be contemplated, including where a discharge might be proposed, and what listed species, if any, might inhabit whatever area might be impacted.

In the absence of that site-specific information, evaluation of potential effects on endangered species is an exercise in speculation. The futility of such an exercise is particularly evident in Alaska. Obviously, the sheer size of this state, and the extent of its coast-line, dwarfs that of any other state. Most of Alaska remains a pristine wilderness, providing habitat to many species, including thirteen species listed as either endangered or threatened under federal law.[11] Presumably, one tasked with evaluating, at the program approval stage, how a state permit program might impact endangered species in Alaska, would have to invent myriad discharge scenarios into different ecosystems. Such an evaluation, no matter how comprehensive, would still be mere speculation.

To satisfy the Ninth Circuit's new requirement, a state such as Alaska would have to replicate the federal consultation process for each permit that the state proposes to issue. The practical consequence of this is that Alaska would have to take on an additional, potentially enormous administrative responsibility (i.e., ESA consultation) in order to administer the NPDES program. ESA consultation is not something that the State of Alaska currently does, in any context. Placing such a duty on the state

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[11] *See* http://ecos.fws.gov/tess_public/StateListing.do?status=listed&state=AK

would contradict the ESA's own terms, which provide that consultation requirements apply only to other federal agencies, and not to states.[12] Thus, the Ninth Circuit decision effectively revises not only the CWA's list of program approval criteria, but also the ESA's statement of applicability.

If there is another way for a state NPDES program to obtain EPA approval in the shadow of this decision, the Ninth Circuit did not acknowledge it. Instead, the court considered and rejected several other ways of protecting endangered species, as alternatives to imposing the duty of ESA section 7(a)(2) consultation on the state. Those alternatives included EPA's continuing oversight of an approved state program, both under a Memorandum of Agreement with the Services[13] and over each state-issued permit; ESA's "anti-take" provisions under sections 9 and 10[14]; Arizona laws protecting native plants; and Arizona's written assurances that it will protect endangered species.[15] The Ninth Circuit's rejection of these alternative paths to ESA compliance leaves Alaska with little hope that it can get an approved program without replicating the consultation procedures required of federal agencies under ESA section 7(a)(2).[16]

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[12] *See* ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2).

[13] The term "Services" refers to the U.S. Fish and Wildlife Service for terrestrial species, and the National Marine Fisheries Service for marine species. *See* 50 C.F.R. §§ 402.02, 402.14.

[14] *See* 16 U.S.C. §§ 1538(a), 1539.

[15] *See Defenders of Wildlife*, 420 F.3d at 973-977.

[16] Unlike Arizona, Alaska has a state Endangered Species Act, codified at AS 16.20.180-.210. But the panel majority opinion in *Defenders* sheds no light on whether such a state program, which is

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Finally, Alaska is concerned that the decision may have implications extending beyond the NPDES context. The Ninth Circuit's rationale may lead other federal agencies to undertake ESA section 7 consultation in their review of other proposed delegations of federal programs to Alaska. For example, if the decision is left to stand, it could affect federal fishery preemption and delegation decisions under the Magnuson-Stevens Act[17]; Alaska's efforts to regain federal delegation of subsistence management authority under the Alaska National Interest Lands Conservation Act[18]; and Alaska's efforts to obtain delegation of management authority over marine mammals under the Marine Mammals Protection Act.[19] The basic rationale of the decision, which applies ESA section 7(a)(2) to non-discretionary federal decisions arising under other federal statutes, could well erode the state's right to primacy in other statutory and regulatory contexts.

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different from the federal act, would be sufficient to support EPA approval of an NPDES program.

[17] *See* 16 U.S.C. § 1856 (providing for state jurisdiction in state waters, authorizing delegation of jurisdiction to states in federal waters, and providing for preemption of state management after a hearing in narrow circumstances).

[18] *See* 16 U.S.C. § 3115(d) (providing that the federal subsistence management program will not be implemented if the State enacts and implements laws of general applicability consistent with specific requirements of ANILCA).

[19] *See* 16 U.S.C. § 1379(b), (f) (allowing transfer of marine mammal management authority to the State of Alaska if specific criteria are met).

CONCLUSION

Alaska would like to join the vast majority of states that have already assumed from the federal government the responsibility of issuing permits for discharges of pollutants into surface waters. Congress clearly intended for states to take on this function.[20] The Ninth Circuit decision in this case frustrates Congress' intent, and also is impeding Alaska's on-going efforts to develop an NPDES permit program that EPA can approve. The decision also deepens the divide between circuits on the legal issue of whether ESA consultation is required on the approval of a state NPDES program. This Court should grant the two pending petitions for writ of certiorari and review the Ninth Circuit decision.

Respectfully submitted,

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[20] *See* CWA § 101(b), 33 U.S.C. § 1351(b).